

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER 06-0197  
SALES AND USE TAX  
For Tax Period 2002-2004**

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**Issues**

**I.     Sales and Use Tax –Imposition on Surgical Packs and Trays**

**Authority:** IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(b); IC 6-2.5-3-2(a); 45 IAC 2.2-5-28(g); 45 IAC 2.2-5-36(b); 45 IAC 2.2-5-36(a); *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E 2d 651 (Ind. 1948).

The Taxpayer protests the denials of refunds of tax paid on surgical packs and trays.

**II.    Sales and Use Tax –Imposition on Finance Charges**

**Authority:** IC § 6-2.5-1-5(b)(2).

The Taxpayer protests the assessment of use tax on finance charges.

**III.   Tax Administration-Imposition of Negligence Penalty**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b).

The Taxpayer protests the imposition of the negligence penalty.

**Statement of Facts**

The Taxpayer is a corporation that operates an outpatient surgical center. The Taxpayer filed a claim for refund of sales and use taxes paid. Subsequently, the Indiana Department of Revenue (Department) audited the Taxpayer. The Department denied a portion of the refund claim and assessed additional sales and use tax. The Taxpayer protested the refund denials and a portion of the assessments. The Taxpayer withdrew its protest to the assessments in three areas — 1. subscriptions and books; 2. miscellaneous surgical instruments, supplies, and equipment; and 3. miscellaneous tangible personal property. A hearing was held and this Letter of Findings results.

**I. Sales and Use Tax –Imposition on Surgical Packs and Trays**

**Discussion**

The Taxpayer maintains a variety of “surgery packs and trays.” There are Arthroscopy Packs, Basic Packs, Cystocopy Packs, Laparoscopy Packs, Laparotomy Packs, Peri/Gyn Packs, Shoulder Packs, C-Packs, and Skin Prep Trays. These packs and trays contain articles such as surgical drapes, syringes, suture bags, disinfectants; gowns, forceps, instrument wipes, irrigation solution, towels, and sheets. Physicians have determined the exact set of items to be included in each pack or tray. Prior to surgery, a physician indicates in writing which packs and trays the surgeon will require to perform the particular operation. The Taxpayer claimed a refund of sales and self assessed use taxes paid on the items included in these packs and trays. The Department denied the refunds except for the taxes paid on the suture bags. The Taxpayer protested the refund denials.

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that the assessment is incorrect. Id.

IC § 6-2.5-2-1(a) imposes a sales tax on retail transactions made in Indiana. A retail sale is defined as a retailer transferring tangible personal property for consideration in his ordinary course of business. IC § 6-2.5-4-1(b):

IC 6-2.5-3-2(a) imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and stored, used, or consumed in Indiana if no sales tax was paid at the time of purchase. There are a number of exemptions from the taxes pursuant to the statute. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E. 2d 651 (Ind. 1948).

The Taxpayer argued that the surgery packs and trays qualified for exemption from the sales and use taxes because the items were prescribed by a physician, necessary for surgery, and sold to the patient pursuant to 45 IAC 2.2-5-28(g) as follows:

The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax.

The Taxpayer argues that the supplies are prescribed by a licensed physician when the physician writes that a particular surgery pack or tray is needed for the medical operation. The Taxpayer also argues that the items are sold to the patient because they are used in the surgery, cannot be reused, the patient has the right to take the used items home. Finally the Taxpayer argues that the patient pays for the items used during the surgery.

The cited Regulation must be read in conjunction with 45 IAC 2.2-5-36(b) which states as follows:

The purchase of items for resale by the physician or surgeon. In order to resell items the practitioner must be licensed as a retail merchant, and must quote the selling price of any items separately from the charge for professional service.

The Taxpayer does not quote the price of the items in question separately from the total cost of the surgery. There is a fee for the surgery. That fee covers the cost of the supplies in the surgery packs and trays. The equipment and supplies used during the surgery are disposed of rather than sent home with the patients. The Taxpayer's regular course of business is providing outpatient surgeries, not selling surgery supplies. The Taxpayer is not a registered retail merchant. The Taxpayer's physicians perform and charge for a medical service, outpatient surgery. The surgical instruments, equipment, and supplies the physicians use in performing this service are subject to the sales and use tax pursuant to 45 IAC 2.2-5-36(a).

Alternatively, the Taxpayer argues that anything written by a physician as medically necessary for a patient should be exempt from the sales and use tax. There is no support for this position in the law.

### **Finding**

The Taxpayer's protest is respectfully denied.

## **II. Sales and Use Tax –Imposition on Finance Charges**

### **Discussion**

The Department assessed use tax on certain charges as the price of goods used by the Taxpayer. The Taxpayer contended that charges were actually finance charges and therefore exempt from the use tax.

IC § 6-2.5-1-5(b) provides as follows:

“Gross retail income” does not include that part of the gross receipts attributable to:

. . .

(4) interest, financing, and carrying charges from credit extended on the sale of personal property if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

The contract under which these charges were billed is for the Taxpayer's purchase of major medical machinery. The contract states that there is an annual interest rate of 9.75 percent for the first 24 months of its term on the total purchase price of \$107,532.00. The third year of the contract there will be an automatic adjustment to prime plus one percent. The interest rate for the

first two years is stated as \$34.72 per month. In the months when there is a separately stated \$34.72 finance charge, that charge is exempt from the use tax. The Taxpayer did not sustain its burden of proving that any of the other months have a separate finance charge listed.

### **Finding**

The Taxpayer is sustained as to the months for which there is a charge listed of \$34.72. The Taxpayer's protest to the remainder of the charges is respectfully denied.

### **III. Tax Administration-Imposition of Negligence Penalty**

#### **Discussion**

The taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Taxpayer failed to pay the sales tax on clearly taxable items such as magazine subscriptions and newsletters. The Department publishes clear and easily accessible instructions concerning the Taxpayers' duty to pay tax on these items. The Taxpayer's breach of its duty to pay tax on these items constitutes negligence.

### **Finding**

The taxpayer's protest is respectfully denied.